

No. 12927.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ANN SHERIDAN,

*Plaintiff, Appellee and Cross-Appellant,*

*vs.*

RKO RADIO PICTURES, INC., a Delaware corporation,

*Defendant, Appellant and Cross-Appellee.*

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## CROSS-APPELLEE'S REPLY BRIEF.

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The appeal of Sheridan questions the correctness of the rulings of the trial court based upon the court's construction and interpretation of certain provisions of the contract under which RKO employed Sheridan to render her services as a motion picture actress in a motion picture to be produced by RKO. The provisions of the contract giving rise to the controversy are found in paragraphs 1 and 29 and in the various paragraphs fixing the time and manner of payment of compensation.

The court invited and received pretrial arguments, both oral and written, and the rulings complained of by Sheridan were the result of full and careful consideration of the differing viewpoints of the parties, and were not rulings made during the course of trial with only limited opportunity for reflection upon the arguments advanced.

After mature consideration, the court concluded as a matter of law:

“1. That Paragraph 29 of the Contract, and particularly the first sentence thereof, is to be interpreted so that the sentence be considered as an integral part of the whole contract and that the obligation of defendant, if any, could be liquidated by the payment of ‘minimum compensation.’

“2. That the second phrase in the first sentence of Paragraph 29 reading, ‘or to complete the production of “Carriage Entrance”’ should have added to it the phrase ‘with the artist’ and is to be read as though said phrase appeared in the Contract.

“3. That the phrase ‘minimum compensation’ as it appears in the Contract is not so ambiguous as to meaning so as to make it necessary to go outside of the four corners of the Contract to ascertain the meaning of the words and the court states as a matter of law that the phrase ‘minimum compensation’ means \$50,000.00.

“4. That defendant at all times had a right to rely on the first sentence of Paragraph 29 of the Contract and to fully perform its obligations by paying ‘minimum compensation’ and that such right was available to defendant at all times.

“5. That the first sentence of Paragraph 29 of the Contract does not contain such contractual obligations so that only by the payment of the minimum compensation can the defendant avail itself of that portion of the Contract.” [R. pp. 47-48.]

Before proceeding with our argument we call the attention of the court to the fact that Sheridan's brief contains certain statements of fact which find no support in the record. Thus, on page 6, the assertion is made: "The lengthy contract was devoted almost entirely to protecting the interests of the employer 'RKO.'" No part of the contract is before the court except that set forth in the appendix to the brief of Sheridan, and there is nothing in such excerpts to bear out this statement. There is nothing in the pleadings or in the evidence to suggest fraud, duress or mutual mistake, or that the contract was not one entered into freely and voluntarily by two parties, each competent to contract and each fully familiar with all the terms and conditions of the agreement, and each represented by agents and attorneys of their own choice. Sheridan sues on the contract exactly as written and there is no warrant for any suggestion or intimation of unfairness or over-reaching on the part of RKO.

Again, counsel for Sheridan says "it is Sheridan's position that the District Court erroneously applied the contract *drafted in its final form*<sup>1</sup> by the legal department of RKO, against Sheridan and in favor of RKO" (App. Br. p. 10). And on page 15, "Even if there were uncertainty, it is a settled rule in such cases that the contract is to be construed most strongly against the party who caused the uncertainty to exist—the party drafting the instrument, *in this case RKO.*" Significantly, neither of these

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<sup>1</sup>All italics in this brief are ours.

statements is supported by any reference to the record. Neither could be. We ask that we be permitted to go outside the record in answering these assertions because we know of no other way of refuting these unwarranted and misleading statements. The facts are these: Sheridan negotiated, in 1948, a contract with one Polan Banks, under the terms of which she was to perform her services in a picture based on the Polan Banks novel "CARRIAGE ENTRANCE." (See Sheridan's Op. Br. p. 4.) This contract was drafted but never executed. It was drawn by Sheridan's attorney, Loyd Wright. Under that contract Polan Banks Productions, Inc., was to produce and RKO was to distribute the picture. When Polan Banks Productions, Inc., and RKO agreed that RKO would produce as well as distribute the picture this contract—drawn by Sheridan's attorney—was submitted to and accepted by RKO. It is the identical contract entered into between Sheridan and RKO except for the changes necessitated by the fact that RKO became producer as well as distributor, and except for the addition of the words "or complete the production of 'Carriage Entrance'" in the first sentence of paragraph 29. All of the provisions characterized by Sheridan as being "almost entirely devoted to the protecting of the interests of the employer RKO" were written into the contract by Sheridan's attorney at a time when it was not even contemplated that RKO would be the employer. We do not contend that the matter of who drafted the contract is important—indeed with no evidence on the matter we do not see how it could be—but if any rule of construction is to be resorted to on that basis, the true facts indicate that the interpretation should be against Sheridan rather than RKO.

### Summary of the Argument.

The contract between the parties contemplates the performance by Sheridan of her services in the leading female role in the motion picture entitled "CARRIAGE ENTRANCE." It is therein provided that:

1. She shall not be obligated to perform her services thereunder *unless and until* she approves the actor who would portray the leading male role.
2. RKO shall not be required to use her services or complete the production of "CARRIAGE ENTRANCE" and shall be deemed to have fully performed all its obligations to Sheridan by paying to her the minimum compensation payable thereunder.
3. If because Sheridan does not approve an actor for the leading male role, she does not become obligated to and does not render any services pursuant thereto, RKO shall not be required to pay her any compensation.

The right of RKO to discharge all its obligations to Sheridan by payment of minimum compensation was a valid limitation of liability available under all circumstances if the services of Sheridan were not used in the picture or the picture was not completed with Sheridan appearing therein. If Sheridan rendered any services and the picture was released with her appearing therein, the liability of RKO is fixed by paragraph 22. The fact that RKO erroneously assumed that it was justified, because of her failure to approve an actor for the leading male role, to terminate the contract without any liability, would not deprive it of the benefit of this provision which gave RKO the right to terminate the contract without any cause and upon a resulting limited liability.

The contract was not ambiguous. Taking all of its provisions together, it clearly defined minimum compensation as \$50,000.00 and extrinsic evidence to interpret such term was not admissible, nor was the evidence offered by Sheridan of any aid—even had the contract been ambiguous.

I.

**The Court Below Correctly Construed the Contract to Limit Any Right of Recovery to \$50,000.00.**

**A. The Relevant Provisions of the Contract.**

PARAGRAPH 1.

Sheridan is not required to render any services under the contract *unless* and *until* she has approved: (a) The final shooting script of the photoplay; (b) The director who will direct the photoplay; (c) The actor who will portray the leading male role.

PARAGRAPH 4.

The term of the Sheridan employment shall commence on such date as may be designated by RKO not earlier than June 1, 1949, and not later than July 6, 1949. Under the compensation provisions of the contract it is specified that the compensation fixed is for payment in full for Sheridan's services only if the term of her employment does not exceed fifteen weeks, and that if it is extended beyond fifteen weeks, Sheridan is entitled to receive additional compensation at the rate of \$10,000.00 per week, payable weekly. Under this provision, therefore, unless the services of Sheridan were completed within fifteen weeks after July 6, 1949, she was entitled to receive additional compensation for any period beyond fifteen weeks after July 6, 1949, during which she was working in the picture, at the rate of \$10,000.00 per week.

PARAGRAPH 6.

On condition that Sheridan performs all her obligations, RKO agrees to pay her \$150,000.00 "being hereinafter called the flat compensation," \$100,000.00 of which is deferred and payable only from the gross receipts of the picture, plus 10% of the net proceeds "being hereinafter called the percentage compensation." The compensation of Sheridan is payable as follows: \$50,000.00 on account of the *flat compensation* on the first regular pay day after photography commences; the balance of the *flat compensation* in installments from the gross receipts only after distribution expenses and the negative costs of the picture are first recovered by RKO.

PARAGRAPH 12.

If Sheridan's employment begins later than June 1, 1949, Sheridan agrees to report to RKO during the week prior to the starting date of the term "and to appear, assist and take part in tests, wardrobe fittings, conferences, publicity interviews, rehearsals, still photographs and the like, in connection with CARRIAGE ENTRANCE." *Sheridan is not entitled to any compensation for such services in addition to compensation fixed in paragraph 6.*

PARAGRAPH 21.

If Sheridan is incapacitated from performing, or refuses to perform, her obligations, RKO may either suspend the agreement during such incapacity for as long as such refusal continues, or may terminate the agreement. If the termination takes place during the first five weeks of the term, Sheridan shall refund a pro rata proportion of \$50,000.00 compensation theretofore received by her pursuant to paragraph 6 at the rate of \$10,000.00 per week.

PARAGRAPH 22.

If the agreement is terminated but the picture thereafter released for general distribution with Sheridan appearing therein, her *flat compensation* shall be prorated for the time the term of her employment continued prior to termination at the rate of \$10,000.00 per week, and she shall be entitled to receive the percentage compensation provided for in paragraph 6.

PARAGRAPH 29.

This paragraph reads as follows:

"Producer shall not be required to use Artist's services hereunder or to complete the production of CARRIAGE ENTRANCE, and shall be deemed to have fully performed all its obligations to Artist by paying Artist the *minimum compensation* payable to Artist hereunder. However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder."

**B. The Contract Provision Limiting the Compensation Payable to Sheridan in Certain Contingencies Is, in All Respects, Legal and Valid.**

In view of the fact that much of the argument revolves around paragraph 29, it may be well here to consider the general legal effect and validity of such a contractual provision. Agreements limiting damages recoverable to an agreed maximum have been generally sustained.

"Contractual limitation of liability to an agreed maximum must be distinguished from a penalty or

liquidated damages though every valid agreement for liquidated damages operates as a kind of limitation. Aside from certain restrictions in the field of public utility law, chiefly relating to common carriers, if the agreed amount to which liability is limited is something more than a merely nominal sum, the validity of the provision has long been recognized. It is neither a penalty in that it does not normally operate *in terrorem* to induce proper performance, nor is it of the nature of liquidated damages since it does not purport to be a pre-estimate of probable damages resulting from a breach."

*Williston on Contracts*, Rev. Ed., Vol. 3, p. 2197;  
*Restatement—Contracts*, p. 554;

*Myers Motors v. Kaiser-Frazer Sales Corp.*, 178  
F. 2d 291;

*Warren Scharf, etc. Co. v. Laclede*, 111 Fed. 695.

In *Lorentz v. RKO Radio Pictures, Inc.* (9th Cir.), 155 F. 2d 84, the court had under consideration the following clause in a contract between a producer of motion pictures and RKO (p. 86):

"The Producer expressly waives and releases the corporation from all claims or causes of action based on the failure of the Corporation actually to utilize the services of the Producer or the results thereof, or on the failure of the Corporation to produce or to release or to continue the distribution of the Pictures; provided, however, that nothing contained in this Article of this agreement shall be deemed to relieve the Corporation of its obligation to pay the Producer the fixed compensation payable to him pursuant to Article 1 of Section 11 of this Agreement."

The contract between the parties covered the services of Lorentz in two pictures. He was to receive as fixed compensation the sum of \$50,000.00 per picture, with additional compensation if production required more than forty weeks. Lorentz was also to receive additional benefits in a percentage of the net earnings of the picture and in screen credit as producer and director. After Lorentz had completed 40 weeks services on the first picture and had been paid therefor, but before the first picture was completed, RKO terminated the contract. Lorentz brought suit alleging the termination was wrongful and sought recovery of:

1. Fixed compensation of \$50,000.00 for the second picture.
2. Additional fixed compensation that he would have received if the first picture had been completed.
3. Amounts equal to the percentage of proceeds that he would have received upon production and distribution of the pictures.
4. Damages suffered because he was deprived of screen credit.

A summary judgment was granted as to all of the causes of action other than the cause of action for the recovery of fixed compensation for the second picture. As to that item, RKO admitted that if its discharge of Lorentz was wrongful, he was entitled to recover the sum of \$50,000.00 as fixed compensation, just as it admits here that if it was not justified in terminating Sheridan's contract it is liable for "minimum compensation."

With respect to the clause of the contract quoted above, Judge Stephens said (p. 86):

“The whole contract sets out the obligations of both parties, and the waiver portion limits the obligations of RKO in circumstances not unlikely to arise in the type of enterprise covered by the contract. There are no apt expressions used which indicate any restricted application of the waiver nor to suggest that the payment of all fixed compensation is a condition precedent to its application.

“It is well to recall that the very basis for a ‘waiver and release’ from liability is ‘the failure of the corporation actually to utilize the services of the producer or the results thereof.’ Thus, the contract makes employment certain and as well the payment of the fixed compensation. Such obligation is fixed, but the work to be done and the results of the work must remain in the sound discretion of the moving picture corporation. The expensive business enterprise may by the turn of events at any time indicate the wisdom of discontinuing the production or the showing of a photoplay. Should events of such portent occur, the corporation is absolved from liability from prospective benefits to appellant. Appellee has reserved decision on such question to its own discretion.”

Sheridan contends (Op. Br. p. 18) that Lorentz is not in point, both because of difference in the language in the clauses limiting liability and because of differing facts. With respect to the first contention, it may be pointed out that the court, *in its decision*, says that the release clause must be considered as an integral part of the whole contract, which is exactly the position which the court below took in this case. The result is, that irrespective

of circumstances, the liability of RKO is limited to the payment of minimum compensation.

As differentiating the two situations on a factual basis, Sheridan says that Lorentz had received \$50,000.00, whereas Sheridan had received nothing. The fact is that Lorentz had received no compensation whatever for the services which he was to render in the second picture. Nor is it true, as counsel for Sheridan says, that in the *Lorentz* case there was a definite holding that the employer had not been guilty of breach of contract. On the contrary, on the motion for summary judgment the employer admitted that unless it was justified in discharging Lorentz as and when it did, it has been guilty of breach of contract and the defendant was entitled to recover the fixed compensation which the limitation clause provided for. The two cases are absolutely on all fours.

The Sheridan brief, page 14, refers to the rules against the adoption of the construction of a contract which will work a forfeiture, but clearly that rule has no place in construing this contract.

*Myers Motors v. Kaiser-Frazer Sales Corp.*, 178  
F. 2d 291;

*Warren-Scharf, etc. v. Laclede Const. Co.*, 111  
Fed. 695.

Paragraph 29 of the contract merely fixes the limit of liability of RKO in the event that it sees fit not to use the services of Sheridan in the picture or not to complete the production of the picture with Sheridan. It is a simple contract provision agreed to by Sheridan and no more "permits injustice or places one party at the mercy of the other" than does any other provision of the contract. The validity of such a contract is supported by authori-

ties cited above. It is difficult to see any injustice to Sheridan in the provision. If she renders no services in the photography of the picture or the picture is not completed with her in the leading female role, RKO receives nothing of value, but it must still pay Sheridan the sum of \$50,000.00 for the right to discharge its obligations under the contract.

Sheridan also calls attention, page 14, to the provisions of paragraphs 20, 21 and 23, of the contract, under which RKO was given the right of termination upon the happening of events beyond its control, upon refusal of Sheridan to perform, and upon the breach by Sheridan of the morality clause. These provisions, of course, afford RKO the right of termination *for cause without liability*, and are to be distinguished from the first sentence of paragraph 29 which fixes the liability for termination *without cause in the amount of the minimum compensation* to be paid to Sheridan.

**C. The Court Correctly Held That the Extent of Liability of the Defendant Was to Be Determined Under Paragraph 29 of the Contract.**

**1. THE PROVISIONS OF PARAGRAPH 29 WERE  
OPERATIVE ON AUGUST 17, 1949.**

Sheridan's argument is that RKO could not limit its liability under paragraph 29 because the paragraph was not operative for the reason that Sheridan did render services and the picture was completed, and also because RKO did not elect to rely on the provisions of the paragraph.

Consideration of this paragraph with all the other provisions of the contract make it plain that the parties were contracting with the ultimate object of enabling RKO to

produce a motion picture in which Sheridan would render her services in the leading female role. They were not contracting for the purpose of securing the services of Sheridan in appearing for make-up, costume fittings or discussions concerning the actor to portray the leading male role. Nor was it of interest, nor did either party have in contemplation what might occur in completing production of the picture if Sheridan did not appear. It must be clear that when the contract was executed the parties dealt on the assumption that Sheridan would render her services as the leading lady and that if she rendered no services of that character neither party, at that time, had any interest in the future completion of the picture with some other actress. Certainly services rendered by Sheridan in costume fittings, appearing for make-up and hair dressings or discussions with respect to a leading man were of value only in the event that Sheridan appeared in the actual photography of the picture. Paragraph 12 recognizes this fact and provides that no compensation, in addition to that provided in paragraph 6, shall be paid for such services. Paragraph 22 recognizes the right of Sheridan to compensation even though the contract is terminated by reason of her incapacity (par. 20) or her refusal to perform (par. 21) provided the picture is released *with Sheridan appearing therein*.

Since the plain object of the contract was to secure the services of Sheridan in the photography of the picture, it is submitted that paragraph 29 could only mean that RKO was not required to use Sheridan's services in the photography of the picture, and was not required to complete the production of "CARRIAGE ENTRANCE" with Sheridan in the principal female role. This is the

plain common sense meaning of the contract, and the court neither interpolated words nor went outside the four corners of the agreement to reach this result. Nothing is more clearly established or more fundamental than the proposition that a contract is to be construed according to the intention of the parties, and that this intention, where possible, is to be gathered from the instrument and by taking into consideration all of the provisions thereof.

Civ. Code, Sec. 1639;

*Watson v. Rotary Colorprint, Inc.*, 73 Cal. App. 2d 119;

*Tillis v. Western Fruit Growers, Inc.*, 44 Cal. App. 2d 826;

Civ. Code, Sec. 1641;

*Moore v. Woods*, 26 Cal. 2d 621;

*Olson v. Biola Coop. Raisin Growers Assn.*, 33 Cal. 2d 664;

*Lion Oil Co. v. Golf Oil Co.*, 181 F. 2d 731.

Sheridan intimates that the object of this paragraph 29 was to prevent any claim of Sheridan based on deprivation of the opportunity to exercise and display her talents (an opportunity of which we may observe, parenthetically, she was deprived only because of her refusal to approve any of the numerous persons proposed for the leading male role). There is nothing in the contract or in the record to support this contention and we think plain the objective of the paragraph is that stated by Judge Stephens in the *Lorentz* case (p. 86):

“The expensive business enterprise may by the turn of events at any time indicate the wisdom of discontinuing the production or the showing of a

photoplay. Should events of such portent occur, the corporation is absolved from liability from prospective benefits to appellant. Appellee has reserved decision on such question to its own discretion."

**D. The Failure of RKO to Pay or Tender Minimum Compensation Did Not Constitute an Election Not to Rely on Paragraph 29.**

The argument of Sheridan admits that had RKO paid or tendered minimum compensation at the time the contract was terminated, it would have fully satisfied its obligations under the contract. Indeed no other position would be tenable for the contract makes such payment full performance. Sheridan contends that since RKO failed to pay or tender the minimum compensation, Sheridan may recover not only that amount but also all amounts which she might have recovered had she performed all of her services under the contract. Since payment of the minimum compensation would be full performance of all the obligations of RKO it is difficult to see how this position can be asserted for it is axiomatic that one may not recover as damages for breach of a contract a greater amount than would have resulted from performance.

Civ. Code, Sec. 3358;

*Richardson v. Davis*, 116 Cal. App. 388, 390;

*Johnson v. Hinkel*, 29 Cal. App. 78.

The position of RKO was and is that because Sheridan failed to approve an actor to portray the leading male role in the picture, termination of the contract was justified. Had it been able to successfully maintain this position before the jury, Sheridan could have recovered nothing. Now because the jury found the facts against RKO,

Sheridan asserts a right to recovery not only minimum compensation, but also the balance of her flat compensation as well as her percentage compensation. But since the contract makes payment of the minimum compensation, full performance of all of the obligations of RKO, clearly Sheridan could recover no larger amount upon any theory. It may and frequently does happen that delay in payment of the amount eventually found due under a contract results in incidental loss to the prevailing party, and the law attempts compensation by adding interest—as here where the plaintiff recovered some \$5,162.42 as interest.

Sheridan argues that the failure to pay or tender the minimum compensation was a failure of the consideration which passed to Sheridan for her promise to accept minimum compensation as full performance by RKO. Failure or refusal to pay the fixed compensation does not constitute a failure of consideration. It may give the non-defaulting party the right to sue immediately or release him from his obligations under the contract, but it does not constitute a failure of consideration. The situation can be no different if RKO paid the sum of \$50,000.00 than it would be if Sheridan were entitled to recover such sum by action.

“Failure of consideration does not, of course, mean the nonpayment of the purchase money according to the agreement, the liability to pay, though default be made, being a consideration.” (6 Cal. Jur. p. 208.)

“A total breach of contract is a breach where remedial rights provided by law are substituted for all the existing contractual rights, or can be so substituted by the injured party.” (Restatement of Contracts, sec. 313.)

So, far from claiming the consideration for the promise failed, Sheridan demanded, and by verdict of the jury obtained, the exact amount of such consideration.

In *Lorentz v. RKO*, *supra*, the plaintiff advanced the identical argument, and the court there said (p. 86):

“The fact that the fixed compensation had not been paid in full at the time the action was brought did not constitute a failure of consideration. Non-payment is not synonymous with failure of consideration.”

**E. The Termination of the Contract Did Not Obligate RKO for Any Amount Exceeding the Minimum Compensation.**

The termination of the contract was an absolute right given to RKO. If it terminated the contract for cause it was without obligation to Sheridan. If it terminated the contract without cause it was obligated to pay the minimum compensation. The jury having found the termination to be wrongful, the contract fixed the measure of recovery and the mere assignment of a ground of termination, which the jury found groundless, could not increase the measure of recovery beyond what it would have been had no ground been assigned.

Since the exclusive subject matter of the contract is the use of Sheridan's services, and since Sheridan and RKO are the sole parties thereto, the manifest purpose of this provision is to establish RKO's maximum liability to Sheridan in the event Sheridan's services are not used or if used, the production of "CARRIAGE ENTRANCE" is not completed with Sheridan appearing therein, *i. e.*, to establish RKO's maximum liability upon termination of the contract by whatever process including abandonment.

The failure to use Sheridan's services or to complete the production of the picture could not constitute a breach, for these are contractual rights expressly given to RKO. Any other interpretation would utterly disregard the phrase of "all of its obligations to the artist."

The second sentence of paragraph 29 precludes any liability on the part of RKO to Sheridan should Sheridan fail to become obligated under the contract and fail to render services pursuant to any obligation under the contract. Paragraph 29 as a whole, then, simply sets out the maximum and minimum limits of RKO's liability upon termination of the contract. The maximum limit of "the minimum compensation" is provided for in the first sentence and controls if Sheridan's services are not used by reason of RKO electing not to make use thereof. The minimum limit is provided for in the second sentence and controls if Sheridan's services are not used by reason of Sheridan failing to approve an actor for the leading male role.

The notice of August 17, 1949, did not constitute an election or waiver. On August 17 RKO notified Sheridan that it would not use her services as contemplated by the contract. Such notice was given pursuant to the express provisions of the second sentence of paragraph 29. Whether or not the second sentence controlled on the facts giving rise to the notice, the overall provision of the first sentence providing that RKO is not required to use Sheridan's services or complete the production of the picture still remains a material and operative provision of the contract; and since by its terms RKO was not required to use said services or complete such production, the only question remaining is whether RKO owes Sheri-

dan nothing by the terms of the second sentence, or the minimum compensation referred to in the first sentence.

Sheridan does not argue that RKO was bound to use her services or complete the production. By express provision it was not. By the notice of August 17 RKO simply availed itself of this contractual right. The notice ascribed the second sentence of paragraph 29 as its reason for failing to use Sheridan, and limited its liability accordingly. While RKO may be in error as to the reason and that it was without liability to Sheridan, it is not in error in assuming it was not required to use her or complete the production of the picture.

It is difficult to see how, in refusing to use Sheridan, for whatever reason, right or wrong, RKO could breach a covenant to employ when, in advance and by express provision, it had covenanted against any such absolute duty. Since the contract provided that RKO did not have to use Sheridan's services, a failure or refusal to use them would be consistent with the contract and could not constitute a breach thereof. Of course if RKO failed to use Sheridan's services without fault on Sheridan's part, then by the terms of the first sentence RKO would be liable for the minimum compensation agreed by each party to be the same as and equivalent to RKO's full performance. But, since the payment of that amount is deemed to be the same as full performance, and since the general law is that the injured party can recover not more than the other party's full performance, RKO cannot be held for any amount in excess of that amount designated as equivalent to its full performance.

Such would be the case not only here where the absence of any absolute duty to employ precluded a breach, but also where a breach was possible and did occur. Assuming

the notice of August 17th constituted an anticipatory breach by RKO, it amounted to RKO's preventing Sheridan from performing. At page 200, 4 Cal. Jur. 10-year Supp. is found the following expression of the general and California rule:

*“Remedies upon prevention of performance.* In the event of a prevention of performance whether by repudiation or otherwise, the injured party has an election to pursue any of three remedies. He may treat the contract as rescinded and recover an *assumpsit* insofar as he has performed. Or, he may keep the contract alive for the benefit of both parties, being at all times ready and able to perform. Or, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing, *or for such* other damages as he is entitled to.” (Emphasis added.)

Assuming prevention by RKO, Sheridan would be limited to “such other damages as he is entitled to,” *i. e.*, the minimum compensation. To hold otherwise would be to render meaningless the entire last clause of the first sentence of paragraph 29, as its only ascertainable purpose is to measure the damage to Sheridan should her services not be used.

Paragraph 29 relieves RKO from an absolute obligation to use Sheridan and further provides that, depending on fault, either the minimum compensation or no compensation shall be paid Sheridan in the event her services are not used. The two sentences of the paragraph designate only RKO's alternative liabilities in the event the contract is terminated. If RKO misconceived its liability that misconception could not foreclose to either party

RKO's correct liability as set out in the contract. Therefore, in terminating the contract RKO was not called upon to elect between remedies available to it, but only to proceed under one or the other of two separate substantive rights provided it by the contract to the end that the contract be discharged.

"Doctrine of 'election of remedies' has no reference to transactions giving rise to distinct and independent grounds of action which may be concurrently or consecutively pursued, *or to situations involving choice between substantive rights.*"

*Williams v. Robinson*, 168 So. 644.

The remedy here available to RKO was termination, that was the remedy it pursued, and no remedy inconsistent therewith was resorted to by it. Hence, the choice of one of two alternative rights by or through which the remedy was sought cannot bar subsequent recourse to or nullify the other alternative right, for, as indicated, the doctrine of conclusive election does not apply to the choice of rights.

Were the election doctrine here applicable, however, RKO's mistake was one of fact, *i. e.*, an erroneous conclusion regarding the existence of Sheridan's good faith. The rule of the doctrine does not apply to mistakes of fact, even where the suitor in a first action has mistaken his remedy and sought redress incompatible with the facts of his case. Notwithstanding the bringing of such an action, he can choose over and proceed again.

"While it is a general rule that one may not pursue inconsistent remedies this is subject to a number of exceptions, of which two are particularly applicable here. One exception is where no prejudice to the rights of the defendant would result (*Campanella v. Campanella*, 204 Cal. 515 (269 Pac. 433); *Com-*

*mercial Centre R. Co. v. Superior Court*, 7 Cal. (2d) 121 (59 Pac. (2d) 978, 107 A. L. R. 714). In the last case cited, the court said: "The doctrine of election of remedies is but a specific application of the equitable doctrine of estoppel, and it has been frequently held that a change in remedies does not bring about an election of remedies unless the change involves a prejudice to the opposing party." . . . Another exception to the general rule is applied in those cases where it does not appear that the prior attempted remedy was, in fact, available to the party attempting to pursue it. (*Agar v. Winslow*, 123 Cal. 587 (56 Pac. 422, 69 Am. St. Rep. 84); *Dickinson v. Electric Corp.*, 10 Cal. App. (2d) 207 (51 Pac. (2d) 205).) In the last of these cases, it was said: "It was an attempt to assert a right which did not exist; and one asserting such supposed right is not thereby estopped from later pursuing his rightful remedy." . . . "

*Prussing v. Prussing*, 46 Cal. App. 2d 347, 353.

RKO's termination under the provisions of the second sentence resulted in no prejudice to Sheridan, since it could have terminated anyway, and since, if wrong in disclaiming all liability, it still remains obligated to Sheridan for the minimum compensation. That brings any so-called election under the first exception above cited. RKO's fault, if any, was a mistake of fact. That, *per se*, brings it under the second exception. Thus, under the rules governing the doctrine, an erroneous choice of available rights under which to terminate certainly could not have been conclusive on the chooser.

Nor did RKO waive its rights under the first sentence by proceeding under the second. Waiver is an intentional relinquishment of a known right. It may be expressly or impliedly manifested. Here no waiver was expressed and

on the facts none was implied. The assertion of one right has nowhere been held to automatically manifest the waiver of its alternatives or rights secondary to it. Under the present circumstances, and without more, RKO could be deemed to have waived the benefits of the first sentence only had it made an irrevocable election to abandon the remedies thereof and to stand exclusively upon those of the second. As has been seen, this it did not do.

Likewise, it is not estopped from terminating the contract under the terms of the first sentence should the provisions of the second sentence prove unavailable to it. If the notice of August 17 could be deemed to be misrepresentation sufficient to raise an estoppel, which is highly unlikely, still no prejudice to Sheridan resulted therefrom since if the choice of alternatives was wrong Sheridan yet is entitled to the minimum compensation which is the maximum amount she could have received under the contract were here services not used.

In short, RKO was never in the position of interpreting a factual situation at its peril. It was either liable for the minimum compensation or not liable at all. If its application of the provisions of the second sentence was wrong, the only possible alternative is that provided for in the first sentence, for by the terms of paragraph 29 only one or the other sentence thereof *can* apply where Sheridan's services are not used.

By giving notice that it was not liable at all, RKO could not become liable under the contract for an amount greater than that already provided for by the contract itself. By failing to tender the amount of its maximum liability, RKO could not terminate and forever foreclose its rights under the minimum compensation provision.

At most, therefore, Sheridan has a cause of action against RKO for the payment of money in the amount of the agreed minimum compensation.

Sheridan's position, as we see it, arises from the failure to recognize that the right of RKO to terminate the contract was absolute. It assigned a cause for termination which it was not able to maintain before the jury, but the right of termination was at all times an operative provision of the contract, and the fact that termination was without cause simply brought into play the first sentence of paragraph 29 rather than the second. The cases cited by Sheridan are not in point for the reason that in all such cases the act or omission of the defending party was a breach of contract—here it was a right given by the express terms of the contract.

Counsel cites the ruling of the court below (Op. Br. p. 25), in a memo prepared for counsel on December 13, 1950, but fails to point out that thereafter the court considered further oral and written argument, and its final conclusion is embodied in the declaration.

“(7) That the first sentence of paragraph 29 does not contain such concurrent obligations so that only by the payment of the minimum compensation can the studio avail itself of that portion of the contract;

“(8) That the question of election is not in the case, since at all times the studio had a right to rely on the first sentence of paragraph 29 and to fully perform its obligations by paying minimum compensation. Since this right was available at all times, the notice of the studio, pursuant to the second sentence of paragraph 29, does not constitute such an election as would prevent the studio from concurrently or thereafter, relying on the first sentence of paragraph 29.” [R. pp. 39-40.]

## II.

The Phrase "Minimum Compensation" Is Not Ambiguous. Construing the Contract From Its Four Corners, It Clearly Means the Sum of \$50,000.00.

It is the rule established by statute in California that when a contract is reduced to writing the intention of the parties is to be ascertained from the writing alone if possible (Civ. Code, Sec. 1639), and the whole of a contract is to be taken together so as to give effect to every part if reasonably possible, each clause helping to interpret the other. (Civ. Code, Sec. 1641.)

Paragraph 6 provides Sheridan's compensation. Thereunder she is to receive the sum of \$150,000.00 "being hereinafter called the '*flat compensation*' (plus a sum hereinafter called the '*percentage compensation*') equal to 10% of the net profits." Sheridan's compensation is payable as follows:

(a) \$50,000.00 on account of the *flat compensation* on the first regular weekly pay day after the principal photography of CARRIAGE ENTRANCE is commenced;

(b) The balance of the *flat compensation*, to wit \$100,000.00 is deferred and paid *only* from the gross receipts of the picture ("gross receipts" being further defined in the contract as being the amount remaining after the costs of production and cost of distribution have been paid) and such balance is consequently payable only in the event that there is such surplus of proceeds;

(c) The *percentage compensation* of 10% is payable from the net proceeds of the picture. Further provision is made that "that portion of the *flat com-*

*compensation* which is deferred" is to be paid in installments over a course of ten years only to the extent that the proceeds of the picture are sufficient to pay such amount.

The only money which Sheridan would certainly receive would be the sum of \$50,000.00 payable during the first week of photography. Beyond the payment of this amount, RKO had no fixed or absolute duty. The remainder of the "*flat compensation*" was payable only upon a contingency—namely, that the proceeds received should exceed the cost of production and the cost of distribution in an amount sufficient to pay the remaining \$100,000.00. The parties in the very nature of things must have contemplated that in the event Sheridan's services were not used or the production of the picture not completed with Sheridan, there could and would be no payment of any amount in excess of \$50,000.00, for there would have been no possible fund from which payment thereof could be made. The payment of the minimum compensation is made full performance of all of the obligations of RKO. Such obligations were:

(a) The payment of \$50,000.00 during the first week of photography;

(b) The payment of \$100,000.00 additional *if, but only if*, the proceeds or distribution exceeded the cost of production and distribution by that amount.

(c) The payment of 10% of the *net* profits.

The parties when they substituted payment of the minimum compensation for the payment of these amounts, were speaking of the minimum compensation which Sheridan would receive were the services of Sheridan used and

the production of the picture complete, for that is what the contract contemplated. If A agrees to pay B \$500.00 absolutely, and additional amounts contingently, can there be any doubt that the minimum amount to be paid is \$500.00? Were the additional amounts payable absolutely, then there would be no difference between the minimum and maximum amounts payable to Sheridan—only a difference in the time of payment. But where, as here, only \$50,000.00 is payable absolutely and the remainder of the payments are contingent on sufficient proceeds being received from the distribution, the contingency plainly distinguishes and defines what is meant by minimum compensation.

As pointed out above, not only was the balance of the flat compensation, to wit \$100,000.00 contingent upon the receipt of proceeds beyond the cost of production and distribution, but it could not have become payable at all in either of two situations—if the services of Sheridan were not used, or the production of the picture not completed. These are the situations with which the provision of the contract deals. If the production proceeded beyond the date fixed for payment of the sum of \$50,000.00, to wit the first regular weekly pay day after principal photography commenced, that sum would become payable, but the balance of the flat compensation, \$100,000.00 would not. The phrase “minimum compensation payable hereunder” contemplates the payment of some compensation, and if any compensation becomes payable to the artist under the contract, the amount thereof could not be less than \$50,000.00. This is the first and minimum

amount “payable hereunder” and comes exactly within Webster’s definition of minimum—“the least amount possible.”

There are other provisions of the contract which emphasize this interpretation. The contract expressly says that “flat compensation” (the amount which Sheridan now contends is referred to by the phrase “minimum compensation”) is thereafter referred to as “flat compensation.” It is a fact that throughout the contract wherever the sum of \$150,000.00 is mentioned, that sum is referred to as “flat compensation.” To emphasize this point we have underscored the phrase where used in the contract.

The interpretation which Sheridan would have the court adopt would deny all meaning to the phrase “minimum compensation” and would change the meaning of the words “minimum compensation” to the sum of \$150,000.00—a sum which the contract repeatedly labels as “flat compensation.” The intention of the parties to differentiate between “minimum compensation” and “flat compensation” is plain and clear, and there is no reason to assert that the terms mean the same thing. It would have been a very simple thing, if the parties had \$150,000.00 in mind, in paragraph 29 to have said “flat compensation” for this is the way the sum of \$150,000.00 is designated throughout the contract.

Sheridan contends (Op. Br. p. 33) that our argument not only does violence to the language of the contract but is self-defeating. We have sought to demonstrate that so far from doing violence to the language of the con-

tract, the court's interpretation of the phrase "minimum compensation" is the only reasonable and logical meaning which can be given the language used. The argument that our contention is self-defeating is based upon the fact that if Sheridan performed services in excess of fifteen weeks, she would receive not only \$50,000.00 during the first week of photography, but also the sum of \$10,000.00 for each week in excess of fifteen weeks after the starting date of the contract term. This argument merely highlights the position of RKO. If the court was asked to rule on the question of what was meant by "minimum compensation" if a choice was presented between the amount to be paid in the first week of photography, and that amount *plus* the amount payable *if* services were rendered in excess of fifteen weeks, there could certainly be difficulty in making that choice. Here again it is the contingency which elucidates the term. If more is payable under one contingency than under another, clearly the latter must be the minimum payable under either.

The case of *Lion Oil Co. v. Gulf Oil Corporation*, 181 F. 2d 731, is in point on the proposition that the meaning of a particular provision of a contract must be gathered from the whole instrument. Therein the court said (p. 733):

"In determining whether the trial court erred in interpreting the contract as it did, our duty is restricted to the interpretation of the contract as the parties made it for themselves. It is a fundamental rule in the interpretation of agreements that the intention of the parties must be deduced, not from specific provisions of the instrument, but from its entire context. This is a rule of good sense and

sound logic because the intention of the parties is not evidenced by any part or provision of the instrument but by every part and provision so construed as to be consonant with every other and with the entire agreement. Taking the contract by its four corners and examining it in the light of the circumstances surrounding the parties at the time it was executed, its intention is readily gathered by giving every provision of the instrument its ordinary meaning and effect.”

The plaintiff contended that it was entitled to receive certain sums expended in operating certain oil and gas leases under a contract which provided that defendant should receive one-fourth of seven-eighths of the proceeds until the cost of operations and the production of oil had been recovered by plaintiff, and thereafter one-half of seven-eighths of “all” oil produced. The costs of production having been received by the plaintiff, the court held that the word “all” meant precisely what it said, and:

“Considering the contract as a whole and giving to every provision of the instrument its ordinary meaning and effect we think it clearly appears that the original contracting parties intended that when Smith had been paid in full for all expenses theretofore incurred in developing and operating the leases, out of the  $\frac{3}{4}$  of  $\frac{7}{8}$  of the oil and gas produced and saved from the premises, thereafter Gulf was entitled to receive  $\frac{1}{2}$  of  $\frac{7}{8}$  of all oil, gas or other minerals produced and saved from the premises without any deduction from that stated fraction for current operating costs.” (P. 734.)

A. The Evidence Offered Was Not Admissible Even Were the Contract Subject to Interpretation.

The argument on this point is that even had the court held the contract ambiguous—and we have attempted to demonstrate that the court correctly held it was not—the evidence offered by Sheridan was not competent as an aid to construction or interpretation. The rule is that evidence may be offered for the purpose of resolving ambiguity. Such evidence is allowed, not for the purpose of showing the parties intended something other than what they said, but only to show what they meant by what they said.

*United Iron Works v. Outer Harbor, etc. Co.*, 168 Cal. 81;

*Kunz v. Anglo London, etc. Bank*, 214 Cal. 341;

*Barnhart Aircraft v. Preston*, 212 Cal. 19.

“No authority sustains the proposition that, under the guise of construction or explanation, a meaning can be given to an instrument which is not to be found in the instrument itself, but is based entirely upon direct evidence of intention independent of the instrument. It has been well said that, in the admission of extrinsic evidence, the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare

the meaning of what is written, and not what was intended to be written.”

6 Cal. Jur., p. 251.

The facts which Sheridan offered to prove [R. 106] could be of no assistance in determining what the parties to the contract meant by what they said. The offer related to:

(a) Prior negotiations between Banks and the attorney for Sheridan.

(b) Evidence of the intention of Banks and Sheridan that Sheridan should receive minimum compensation of \$150,000.00. It is difficult to see how these negotiations, to which RKO was not a party, or the intention of either Sheridan or Banks that Sheridan should receive minimum compensation of \$150,000.00, could aid the court in determining this intention from the language employed in the contract between Sheridan and RKO.

(c) The intention of Sheridan and Banks that minimum compensation should not mean \$50,000.00 but that it was their intention that the phrase would be synonymous with the phrase “flat compensation” and meant \$150,000.00.

The offer of proof indicates that this understanding and intention of Sheridan and Banks was never discussed or related to RKO and, of course, could in no way bind RKO. Further, such evidence does violence to the rule that the court is not interested

in what the parties intended to say, but only what they meant by what they did say.

(d) The officers of RKO understood and the budget prepared by RKO showed that Sheridan was to receive \$150,000.00 and a percentage of the profits.

This is what the contract provides, if Sheridan rendered her services in the picture, and the budget could hardly have been prepared upon any other assumption.

(e) Custom or usage in the motion picture industry to show that under the circumstances of this case minimum compensation meant \$150,000.00.

No such custom or usage was pleaded, and being a custom relating to a particular trade, no evidence thereof was admissible in the absence of such pleading.

*Pray v. Trower Lumber Co.*, 101 Cal. App. 482, 489.

Furthermore, neither custom nor usage could be relied upon if in conflict with the terms of the contract.

*New York PRC v. Bach*, 2 Cal. 2d 384-394.

The relation of the offer of proof to the circumstances of this case clearly indicates not an offer to prove a general meaning attributed by the motion

picture trade to the words "minimum compensation" but only a meaning under the particular circumstances of this case including negotiations between Sheridan and Banks which were not binding upon RKO and with which there is no offer to charge RKO with notice—in fact the allegation is that such negotiations were never discussed with RKO.

It is respectfully submitted that the rulings of the court below from which this appeal is taken were correct and should be affirmed.

Respectfully submitted,

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